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No. 07-778

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EMORY ZIPPERER,

Petitioner,

v.

RAYTHEON COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: January 10, 2008

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QUESTIONS PRESENTED

1. Whether the First Circuit's ruling that the Employee Retirement Income Security Act ("ERISA") preempts a former employee's state law claims based upon an incorrect estimate of the amount of future pension benefits conflicts with a decision of this Court.

2. Whether the First Circuit's ruling affirming the District Court's judgment conflicts with a decision of another United States court of appeals.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties named in the caption, Emory Zipperer and Raytheon Company ("Raytheon"), were the only parties to the proceedings before the First Circuit Court of Appeals and the Massachusetts District Court. Raytheon has no parent companies, and there are no publicly-held companies that own ten percent or more of its stock.

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INTRODUCTION

Respondent, Raytheon, respectfully requests that the Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the decision of the First Circuit Court of Appeals. Petitioner has failed to demonstrate any compelling reason for granting the Petition. Specifically, the Petition should be denied because (i) the First Circuit's July 12, 2007 Opinion ("Opinion") is consistent with the relevant, settled decisions of this Court concerning preemption and (ii) Petitioner has failed to demonstrate any conflict with any decision of another court of appeals on the same matter.

STATEMENT OF THE CASE

Proceedings Below

Petitioner, Emory Zipperer ("Zipperer"), filed a complaint for negligence, equitable estoppel, and negligent misrepresentation in the Massachusetts Superior Court on October 15, 2003. The complaint alleges that Raytheon's negligence in administration of the Raytheon Engineers & Constructors Retirement Plan ("the Plan" or "the RE&C Retirement Plan") resulted in an incorrect estimate of retirement benefits. Because the Plan is governed by ERISA, Raytheon timely removed the case to the United States District Court on the basis of federal question jurisdiction. Contrary to Petitioner's assertions, the parties engaged in discovery, exchanging documents and responding to interrogatories. Petitioner's deposition was taken in the case. (*Contra*, Petition for Writ of Certiorari, "Pet." at 26, fn. 2).

On March 1, 2005, Raytheon moved for judgment in its favor on the pleadings. The motion was based upon ERISA preemption because each of the common law claims arise from the incorrect estimate of retirement benefits from the Plan provided by the Pension Administrator. Count I asserts a claim for negligence due to the incorrect estimate of petitioner's monthly retirement benefits resulting from records kept by Raytheon. Count II for equitable estoppel claims that in reliance on this incorrect benefit estimate Petitioner decided to retire. Count III claims that Raytheon negligently misrepresented the amount of his pension benefits due under the RE&C Retirement Plan.

After argument, U.S. Magistrate Judge Marianne B. Bowler recommended that the motion for judgment on the pleadings be allowed. (Appendix to Petition for Writ of Certiorari ("App."), 14a – 28a). Her recommendation included a caveat - Zipperer was permitted thirty (30) days to file a motion for leave to file an amended complaint raising one or more causes of action under ERISA. (App., 27a). Zipperer did not file an amended complaint. Instead, Zipperer filed objections to the report and recommendation.

On March 30, 2006, U.S. District Judge Mark L. Wolf affirmed the recommendation, and allowed the motion for judgment on the pleadings. (App., 11a – 14a). Judge Wolf provided Zipperer with another opportunity to file an amended complaint to state a claim on which relief could be granted. (App., 13a). Zipperer did not file an amended complaint. The district court entered judgment for Raytheon, and Zipperer appealed. Following argument, on July 12, 2007 the First Circuit Court of Appeals affirmed the district court judgment. (App., 1a – 10a).

Factual Background

Pursuant to the standards applicable to motions for judgment on the pleadings under Fed. R. Civ. P. 12(c), Raytheon accepts as true the allegations in Zipperer's complaint. The following facts are based upon the allegations.

Zipperer began working for United Engineers & Constructors, Inc., ("UE&C"), a wholly owned subsidiary of Raytheon Company ("Raytheon"), in 1972, and began participating in its retirement plan in 1975. Raytheon Engineers & Construction ("RE&C") is the successor to UE&C. This dispute concerns estimated benefits from the RE&C Retirement Plan.

In 1990, Zipperer began working for another Raytheon subsidiary, Raytheon Services Nevada ("RSN"). RSN performed contract work for the Department of Energy ("DOE") in Nevada. Zipperer's service date with RSN was adjusted to reflect his prior service with UE&C. In 1993, after separating from his employment at RSN, Zipperer was rehired by RE&C, the successor to UE&C. RE&C also credited Zipperer with his prior years of service with UE&C for purposes of calculating his pension benefits.

In 1995, Bechtel Nevada replaced RSN as a contractor to the DOE, and the RSN pension trust fund monies were transferred to the Bechtel Nevada Employees Retirement Plan. As a result, both Bechtel, as the successor to RSN, and RE&C included Zipperer's original UE&C service time in their pension calculations. Zipperer is currently receiving a separate pension benefit from Bechtel, which amount includes all benefits accrued during the periods he worked for UE&C and RSN. RE&C was

sold to Washington Group International ("WGI") on July 7, 2000.

Allegedly based upon an estimate Zipperer received from the RE&C Pension Administrator concerning future benefits from the RE&C Retirement Pension Plan, Zipperer retired from his employment with WGI on September 30, 2000. More specifically, on December 27, 1999, Zipperer addressed a Request for Retirement Calculations for estimated retirement benefits from the RE&C Retirement Plan to the RE&C Pension Administrator. On February 16, 2000, the RE&C Pension Administrator provided Zipperer with an estimate of retirement benefits of $980.55 monthly if he chose joint and survivor annuities. Based on the estimate, Zipperer and his wife decided to retire from their respective jobs. At the time of his retirement, Zipperer earned $107,484 annually.

In June of 2001, Zipperer was informed by the Raytheon Benefit Center that his pension benefits had been incorrectly overstated in the earlier estimate, and that he was entitled to receive only $400.06 per month from the RE&C Retirement Plan. As a result, on an annual basis, Petitioner receives approximately $7,000 less in retirement benefits than initially estimated. According to Zipperer's allegations, the earlier overstated benefit estimate resulted from Raytheon's incorrect report of Zipperer's benefits to be received from the RE&C Retirement Plan. Zipperer administratively appealed the decision concerning his pension benefits, and exhausted all internal appeal procedures regarding the decision to pay him the correct amount of pension benefits.

The RE&C Retirement Plan is a pension plan governed by the Employee Retirement Income

Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* The Plan has reserved absolute discretion for interpreting and deciding questions under the Plan. The Plan is administered by a Retirement Committee which serves "at the pleasure of the Directors." Under the terms of the Plan, the Committee is to "determine any and all questions arising in the applications of the provisions of the Plan in such manner and upon such basis as the Committee shall in its absolute discretion deem to be proper and fair and equitable under the circumstances." Among other responsibilities, the Committee is to "keep appropriate records of the operation of the Plan."

Zipperer does not specifically allege that he is entitled to additional benefits under the Plan. Put more positively, Zipperer is receiving all the benefits that he is entitled to under the Plan. There is no allegation that the decision of the Pension Administrator regarding his benefits was improper under the terms of the Plan. Instead, Zipperer alleges that Raytheon's failure to "properly maintain records and information concerning his retirement plan" resulted in the provision of incorrect data concerning his retirement benefits. He alleges that the breach of this duty to "properly maintain records" resulted in a single incorrect estimate provided by the RE&C Pension Administrator, which caused him and his wife to retire. Even accepting Petitioner's assertion that an annual benefit difference of approximately $7,000 motivated a different retirement decision, any causes of action based upon the benefit estimate fall within the scope of ERISA, and are completely preempted because they relate to regulation of the ERISA plan.

REASONS FOR DENYING THE PETITION

I. THE FIRST CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

The underlying First Circuit decision does not conflict with any decision of this Court concerning ERISA preemption. Applying the developed law, the First Circuit appropriately affirmed the District Court's judgment holding that Petitioner's claims are preempted by ERISA. The decision is consistent with the increasing clarity provided by this Court to ERISA preemption jurisprudence with cases such as *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

This Court's decision in *Aetna Health* did not change the law concerning ERISA preemption as suggested by Petitioner. Instead, this Court confirmed the reasoning of prior decisions concerning preemption. More specifically, citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, at 54-56 (1987), the Court confirmed:

> "[T]he detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in

> ERISA. 'The six carefully integrated civil enforcement provisions found in §502(a) of the statute as finally enacted ... provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Id.*, at 54, 107 S.Ct. 1549 (quoting *Russell, supra*, at 146, 105 S.Ct. 3085).
>
> Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted."

Aetna Health Inc. v. Davila, 542 U.S. 200, 208-09 (2004).

Petitioner's state law claims seek to supplement ERISA's enforcement remedies by engrafting a duty to maintain and convey accurate employment records in the administration of the Plan. As in *Aetna Health*, Petitioner is only entitled to pension benefits due to the terms of the ERISA-regulated employee benefit plan, and any duty to keep accurate employment records was only breached in relationship to the Plan. In essence, Petitioner seeks a remedy for the Plan's failure to pay the benefits wrongly estimated prior to his retirement. Such causes of action are superseded by ERISA because they relate to the employee benefit plan. ERISA, §514(a), as set forth in 29 U.S.C. §1144(a) (the preemption clause).

ERISA's civil enforcement provisions, at Section 502(a), provide the exclusive vehicle for Zipperer to enforce his rights under the Raytheon pension plan. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). Under the civil enforcement provisions, a plan participant may sue to recover benefits due, to enforce rights under the plan or to clarify rights to future benefits. In addition, a participant may bring suit for breach of fiduciary duty to seek appropriate relief due to the breach of fiduciary duty. Id. at 53. Given Petitioner's concession that he has no remedy under ERISA, his assertion that his claims do not supplement any remedy provided by ERISA is not well based. (Pet., 26).

Zipperer is receiving the appropriate level of benefits under the Plan. Upon Raytheon's determination that it was providing Zipperer with the wrong level of benefits, it corrected its mistake and provided notice to Zipperer of the correct level. It also considered and denied Zipperer's appeal of the decision concerning his pension benefits. Accordingly, he cannot make out a claim for benefits due under ERISA, Section 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). Further, despite two opportunities to amend his complaint, he did not assert a claim for other relief provided under ERISA for breach of fiduciary duty or any other federal common law claim.

Zipperer makes claims for compensatory money damages which are unavailable under ERISA. A plaintiff may only seek equitable relief, not legal relief such as money damages, under Section 502(a)(3) of ERISA for breach of fiduciary duty. *Great-West Life & Annuity Insurance Company*, 534 U.S. 204 (2002). Claims for consequential losses, even if framed as requests for restitution as a form of equitable relief, are not available under Section

502(a)(3) of ERISA. Relief under ERISA's Section 502(a)(3) is limited to traditional forms of equitable relief. This Court has observed repeatedly that ERISA is a "comprehensive and reticulated statute" which was the product of a decade of congressional study. Accordingly, the Court has been "especially reluctant" to tamper with the statute's enforcement scheme by extending unauthorized remedies. *Id.*, at 209.

Zipperer's attempt to avoid preemption amounts to an extension of such unauthorized remedies, and seeks to supplement the remedies provided by ERISA. His damages are based upon the administration of his pension benefits under an ERISA plan, which resulted in him being provided with a wrong estimate. Petitioner's attempt to avoid preemption amounts to an attempt to both add causes of action to ERISA, and to obtain damages which are unauthorized by ERISA. Such an attempt is foreclosed by existing precedent, and, if permitted would compromise the uniform regulatory regime established by ERISA.

Contrary to Petitioner's suggestions, *Aetna Health* reiterated that ERISA's "expansive preemption provisions...are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'" *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004) (citation omitted). The First Circuit's decision recognized that Petitioner's claims, if allowed, would result in different administrative procedures in different jurisdictions, a result that ERISA is designed to avoid. Indeed, as in *Aetna Health*, Petitioner is bringing suit to rectify a denial of benefits promised under the pension plan. Although there may be a separate legal duty, such as the duty of ordinary care imposed by the statute in

Aetna Health, the alleged breach of legal duty he seeks to remedy is dependent on the ERISA-regulated Plan. As recognized by the Magistrate in the decision below:

> Regardless of the label of the state law claims, in essence they seek extra-contractual benefits not authorized by the terms of the Plan. Such an end run around the carefully crafted benefits Raytheon chose to provide and fund amounts to an attempt to authorize remedies beyond those provided by the Plan. *See generally Aetna Health, Inc. v. Davila*, 124 S. Ct. at 2498-2499; *Carlo v. Reed Rolled Thread Die Company*, 49 F.3d 790, 794 n.3 (1st Cir. 1995).

(App. 23a).

Petitioner's claim that Massachusetts General Law's record-keeping requirements impose an independent legal duty that permits this Court to ignore both precedent and the limitations of ERISA is without merit. While Massachusetts law provides certain record-keeping responsibilities for employers, as Petitioner recognizes, the recordkeeping functions at issue in this case "as a matter of necessity, arise in the administration of a particular pension plan." (Pet., 28). As in *Aetna Health*, where the respondents unsuccessfully argued that the state law obligations of the Texas Health Care Liability Act (THCLA) were outside the scope of ERISA's preemptive sweep, any potential liability derives from the rights and obligations established by the pension plan. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 213 (2004). The Petitioner recognizes that Raytheon had

"recordkeeping requirements in its pension plan." (Pet., 29). Raytheon's recordkeeping requirements relative to Petitioner's dates of employment are at issue only because of the Plan's administration, resulting in an incorrect estimate. Accordingly, Petitioner's claims are preempted despite the existence of any independent duty to keep personnel records.

Further, there is no independent cause of action for damages under Massachusetts General Law for mistakes in personnel records. Instead, an employee is only provided with the opportunity to correct personnel records. *Kessler v. Cambridge Health Alliance*, 818 N.E.2d 582, 588 (Mass. App. Ct. 2004). Where even the state law provision which allegedly imposes an independent legal duty concerning personnel records does not provide the remedy Petitioner seeks, the argument that Petitioner may avoid the clear limitations of ERISA is even more tenuous. The Petitioner is entitled to pension benefits only because of the terms of the ERISA-regulated plan. Any purported liability relating to the Massachusetts personnel records statute derives from Raytheon's recordkeeping obligations in administration of the Plan. The causes of action are dependent on the existence and administration of the ERISA-regulated plan.

Whether analyzed under what Petitioner describes as a "textualist common sense analysis" or a "more pragmatic field/conflict analysis," Petitioner's claims are preempted by the civil enforcement remedies of ERISA. In determining whether a state statute or cause of action is preempted by ERISA, this Court has directed evaluation of both the objectives of the ERISA statute and the effect of the state law on ERISA plans. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). A principal goal of ERISA is to "enable

employers 'to establish a uniform administrative scheme which provides a set of standard procedures to guide processing of claims and disbursement of benefits.'" *Id.*, at 148 (citation omitted). By establishing these standards and preempting state law, ERISA "minimized the need for interstate employers to administer their plans differently in each State in which they have employees." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983).

This Court has explained that the purpose of the broad preemptive effect of Section 514(a) is:

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries... Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement."

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (citations omitted).

The misconduct Zipperer complains of – the failure to maintain proper records concerning his retirement plan resulting in an erroneous estimate of benefits – is intimately connected to administration of the Plan. Zipperer complains that Raytheon did not keep correct data relating to Zipperer's dates of employment in its records concerning his pension plan. Allowing Zipperer to maintain a state cause of action for such conduct would interfere with the goal of uniform administration of ERISA plans because it would impose common law record-keeping requirements upon the employer and Plan administrator in addition to the statutory requirements of ERISA. It would also directly interfere with the calculation of benefits owed to an employee, since it is clear that Zipperer would not assert any claims if Raytheon paid him the incorrectly estimated amount of benefits. Permitting such claims would permit Zipperer to obtain extra-contractual benefits which are unauthorized by the terms of the Plan, and as such the claims are preempted. Further, Zipperer's claims are preempted because the claims conflict with ERISA's directive that "plans be administered, and benefits be paid, in accordance with plan documents." *Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001).

In Count I of his Complaint for negligence, Zipperer claims the incorrect estimate of his monthly retirement benefits resulted from negligence in maintaining employment records. This negligence, in turn, resulted in wrong information provided to the Plan administrator for the calculation of Zipperer's estimated benefits under the Plan. This claim can only be evaluated with reference to the Plan administrator's or the employer's responsibilities under ERISA to determine what records it

needed to maintain for the Plan. The claim also requires reference to the Plan because the alleged misrepresentation itself concerns the amount of benefits Zipperer would be entitled to upon retirement. Further, the communication of information about Zipperer's dates of service to the Plan administrator arose in the context of administration of the Plan.

Similarly, in Count II for equitable estoppel, Zipperer claims that he reasonably relied upon incorrect information concerning the amount of his monthly pension benefits under the Plan. Again, this claim relates directly to the ERISA Plan as the misstatement consisted of the estimate of retiree benefits. If a common law cause of action could exist for the provision of an incorrect estimate, it would conflict with an important purpose of ERISA – ensuring that Plans are subject to a uniform body of law regarding fiduciary responsibilities for plan administrators and employers.

Finally, Count III for negligent misrepresentation alleges that Raytheon negligently misrepresented the amount of his pension benefits due under the Plan. Analysis of this claim requires calculation of the benefits under the Plan to determine whether the estimate was incorrect. Further, the communication was made to Zipperer in the context of administering his benefits under the Plan. Each of these claims is connected with the Plan and relate to administration of the Plan.

ERISA is a comprehensive statute which provides uniform standards of conduct for employers concerning reporting, disclosure, fiduciary responsibility and administration of employee benefits plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990). A determination that a state cause of action

could exist due to an employer's negligence in providing information relating to Plan benefits would engraft another duty upon the employer in its administration of the Plan. Plan administrators and employers would be deterred from providing any information about future benefits to employees if an estimate, albeit erroneous, could lead to liability. In addition, such claims would have a negative impact on the ability of an employer such as Raytheon to rely on the terms of the benefit plan. Such a result would thwart the ERISA objective of promoting the interests of all plan beneficiaries. The claims all relate to the Plan, and to the administration of the Plan. As such, the plaintiff's claims are preempted by ERISA.

II. THE DECISION OF THE FIRST CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS.

The First Circuit applied established precedent to hold that Zipperer's claims are preempted, and Petitioner cites no conflict in the United States courts of appeals inviting review. Indeed, the law is well-settled that state law claims based on pension misrepresentations are preempted by ERISA. Petitioner makes no argument that the First Circuit's decision in this case conflicts with the decision of another United States court of appeals on the same matter.

As recognized in the Magistrate's recommendation, the First Circuit's decision is consistent with the decisions of other United States courts of appeals finding breach of contract claims based on erroneous

statements regarding future benefits preempted. (App., 26a) *See, Dranchak v. Akzo Nobel Inc.*, 88 F.3d 457 (7th Cir. 1996) (state law contract claims based on letters promising extra pension benefits preempted); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987)(state law claims based on oral agreement to modify ERISA plan preempted); *see also Slice v. Sons of Norway*, 978 F.2d 1045 (8th Cir. 1992) (state law claims based on erroneous pension benefits statement preempted by ERISA); *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908 (9th Cir. 1998), *cert. denied*, 528 U.S. 1116 (2000) (recognizing that this Court's jurisprudence required preemption of claims based on statements regarding tax consequences of plan benefits, and reversing prior decision finding no preemption); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986) (ERISA preempted state law estoppel claims based on oral agreements to modify written terms of employee benefits plan).

Further, the First Circuit's prior opinions applying preemption analysis and addressing similar claims brought by former employees, confirm that Petitioner's state law claims are preempted. *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790 (1st Cir. 1995) (state law claims based on alleged misrepresentations concerning early retirement benefits preempted); *Degnan v. Publicker Indus., Inc.*, 83 F.3d 27 (1st Cir. 1996) (misrepresentation claim concerning future amendments to retirement plan preempted). There is no conflict in the United States courts of appeal that is appropriate for review.

CONCLUSION

The rulings of the District Court and the First Circuit do not conflict with either a decision of this Court or a decision of any United States court of appeals. Nor do the lower court rulings implicate an important question of federal law that has not previously been addressed by this Court. While the Petition provides a recitation of this Court's decisions concerning preemption, Petitioner has not demonstrated any compelling reason for granting his Petition. Raytheon respectfully requests that the Petition be denied.

Respectfully submitted,

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